

National Surface Cleaning, Inc. and Humberto Yeppes and Rodrigo Marmolejo. Cases 2-CA-25606 and 2-CA-25894

July 28, 1994

DECISION AND ORDER

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On December 21, 1993, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, National Surface Cleaning, Inc., Elmwood Park, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Respondent filed a motion for special leave to file a reply to the Acting General Counsel's answering brief. However, reply briefs are automatically provided for under Sec. 102.46(h) of the Board's Rules. Therefore, no motion for special leave was necessary.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondent has excepted to the judge's finding that Project Manager Ortega thought that employee Yeppes had betrayed him. Ortega testified that "I was extremely upset with [Yeppes] because I gave him work and I heard he had filed a complaint against me. The [sic] hurt and why I was upset was that he came over to shake my hand and thank me and the next thing I know he filed charges against me. That's why I was really upset." Although the Respondent correctly notes that Ortega did not characterize Yeppes' conduct as a "betrayal," as did the judge, we find that the judge drew a reasonable inference from Ortega's testimony.

In affirming the judge's findings, we find it unnecessary to rely on the fourth paragraph of the judge's analysis section.

³We adopt the judge's recommended Order, including par. 2(a), which contains the Board's traditional reinstatement language. We do not adopt fn. 7, par. 3 of the judge's decision, which limits the Respondent's reinstatement obligation to the New York City area, because we find no basis for deviating from the standard remedy the Board provides employees unlawfully denied employment.

Terry A. Morgan Esq., for the General Counsel.
Nathan L. Kaitz, Esq. (Morgan, Brown & Joy), for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on September 1-3, and 29, 1993. The charge in Case 2-CA-25606 was filed by Yeppes on March 2, 1992, and was amended on March 16 and October 1, 1992.¹ The charge in Case 2-CA-25894 was filed by Marmolejo on July 30, 1992. A consolidated complaint was issued on October 30, 1992, and alleged in substance:

1. That the initial charge in Case 2-CA-25606 was filed by Yeppes on March 2, 1992, and served on the Respondent on March 6, 1992. That charge which was received by the Company on March 9, 1992, alleged that Yeppes and other employees were laid off on February 21, 1992, because of their union membership.

2. That since on or about March 12, 1992, the Respondent in violation of Section 8(a)(1) and (4) of the Act has failed and refused to recall Yeppes because he filed the aforementioned charge.

3. That on or about March 12, 1992, the Respondent in violation of Section 8(a)(1) and (4), discharged Jairo Duque, Cesar Duque, Libardo Quintero, and Carlos Silva because it believed that these employees had given testimony and assisted in the investigation of the aforementioned charge.

4. That since on or about April 9, 1992, the Respondent in violation of Section 8(a)(1) and (4), has refused to permit Libardo Quintero to return to work for the same reasons described above in paragraph 3.

5. That in or about the first week of June 1992, the Respondent in violation of Section 8(a)(1) and (4), has refused to reemploy Rodrigo Marmolejo for the reasons described in paragraph 3.

It is noted that the consolidated complaint does not allege that the initial layoffs on February 21, 1992, which precipitated the initial unfair labor practice charge, was violative of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹It was only with the second amended charge in Case 2-CA-25606 that an 8(a)(4) allegation was made; the initial charges alleging that the Company violated Sec. 8(a)(1) and (3) of the Act. Notwithstanding the fact that the second amended charge was filed more than 6 months after the events alleged as being violative, it is my opinion that the 8(a)(4) allegation is sufficiently related to the initial and timely filed charge so as to avoid being barred by Sec. 10(b) of the Act. *Wilson & Sons Heating*, 302 NLRB 802 (1991), and *Redd-I, Inc.*, 290 NLRB 1115 (1988).

II. ALLEGED UNFAIR LABOR PRACTICES

The Company is engaged in the business of removing asbestos from buildings. It has an office at Elmwood Park, New Jersey, but operates at various building sites in and around New York. At the sites, the Company employs a project manager plus one or more foremen who supervise a crew of asbestos removal employees. The project manager who was involved in this case was a man named Pablo Ortega who was in charge of work at 1411 Broadway, New York City.

The work of the Company involves taking down walls, removing asbestos, and rebuilding. The employees involved in this work, wear specialized suits and respirators which are designed to protect them from inhaling asbestos fibers.

Manning of the various projects is normally carried out by the project manager who, as a general rule, has a group of employees with whom he has worked with in the past and who he uses when needed. The work is sporadic and depends on whether the Company successfully bids for jobs. For example, the employees involved in the present case, agreed that they would work for a limited period of time, be laid off, and then recalled when another project became available.

Humberto Yeppes has been involved in this industry for a long time in various capacities from employee to project manager. In 1990, he along with some other persons, tried to operate their own company but this was not successful. In comparison to the other employees involved in this case, Yeppes is older and more experienced. In fact, Pablo Ortega worked under Yeppes at other companies and no doubt learned his trade from the more experienced man.

In November 1990, Yeppes suffered a heart attack and was on disability until May 1991. On or about May 28, 1991, Yeppes was hired by National at a jobsite located at 100 Wall Street where the project manager was Roger Solama. When that job was completed, he was then hired to work at 1411 Broadway by his former protegee, Pablo Ortega.²

As of February 1992, the Company had a crew of about 20 workers employed at 1411 Broadway including the 6 alleged discriminatees. Sometime in February, Pablo Ortega laid off Yeppes. Although there is a disagreement about whether Yeppes was laid off in early or late February, this difference is immaterial as it is not alleged that this layoff was motivated by any illegal reasons. In fact, the evidence indicates that by February 1992, a certain amount of friction had developed between Yeppes and Ortega. It appears that Ortega was not satisfied with a couple of foreman assignments he had given Yeppes. On the other hand, it also appears that Yeppes was unsatisfied with the way that Ortega didn't listen to his suggestions. Yeppes testified that Ortega assigned him to menial and relatively unimportant tasks.

On February 21, 1992, Ortega laid off the employees working at 1411 Broadway with the exception of five people

who were reassigned to work at a new project at the Grace building which is located several blocks away. None of the alleged discriminatees were transferred at that point to this new job and at least some of them believed that they were not being transferred to the new location because the Company intended to man that job with nonunion workers.

On or about March 2, 1992, Yeppes visited the Grace building and spoke to Ortega. Not being offered any work, Yeppes shook Ortega's hand and thanked him for the opportunity to work with him. Although unstated, it seems to me that both men understood that Ortega was not going to be offering Yeppes a job at this location.

Later that day, Yeppes, accompanied by Jairo Duque, filed the charge in Case 2-CA-25606 which alleged that on February 21, 1992, the Company laid off its employees at 1411 Broadway because of their membership in Laborers' International Union of North America. This charge was mailed from the Board's Regional Office on March 6 and was received by the Company at its Elmwood Park offices on March 9, 1992.³ Either on the same day or a few days later, Yeppes and Jairo Duque went to Locals 59 and 104 of the Laborers Union and made complaints that the Company was using nonunion labor.

Also in the first week of March 1992, two of the alleged discriminatees, Libardo Quintero and Rodrigo Marmolejo, started working at the Grace building doing asbestos removal work for a company called Mizul Maintenance Corporation. According to Marmolejo, he was paid about \$6 per hour less than when he worked for National.

On March 6 or 7, 1992, Libardo Quintero received a phone call from Pablo Ortega who said that Quintero should call all the people who had been laid off on February 21, and have them report to the Grace building on Monday morning. Quintero called those people for whom he had phone numbers. He did not, however, call Yeppes, as he considered Yeppes to be a supervisor and therefore not included in the job offer made by Ortega.

On Monday March 9, 1992, 15 to 20 employees including the alleged discriminatees (other than Yeppes), went to work at the Grace building on National's payroll. (I do not know what if anything happened to Mizul Maintenance.) As noted above, on March 9, the unfair labor practice charge filed by Yeppes was received by the Company at its Elmwood Park office.

Ortega testified that by Wednesday or Thursday of that week (March 10 or 11), he heard rumors at the work place that Yeppes had filed some charges. He states that at about the same time, he explicitly heard from management (Wittler), that Yeppes had filed the charge. Ortega concedes that on that same day, he called up Yeppes and told him that he was extremely upset because he heard that Yeppes had filed a charge against him. According to Ortega, Yeppes said that he felt very humiliated about not being used as a supervisor and not being transferred to work at the Grace building.

² There was evidence that Yeppes acted as a foreman for some periods of time while working at 1411 Broadway. However, at the time that he last worked, he was not employed in any supervisory capacity. In any event, even assuming that he was a supervisor within the meaning of Sec. 2(11) of the Act, this would not be relevant if it is shown that he was discharged for filing an unfair labor practice alleging antiunion discrimination against employees. *General Services*, 229 NLRB 940 (1977).

³ It appears that on or about March 2 or 5, 1992, a number of employees visited Region 2 of the Labor Board and signed a sheet of paper stating what their addresses and telephone numbers were. This was done so that they could be contacted in the investigation of the charge filed by Yeppes. The people who signed this list were German Rivera, Hector Rueda, Jaime Vargas, Oscar Hernandez, Libardo Quintero, Cesar Duque, Jose Sepolveda, Frank Rueda, Rodrigo Marmolejo, Carlos Silva, and Olivier Toro.

Rodrigo Marmolejo testified that on or about March 10, 1992, Ortega asked him if he had filed a complaint against Ortega and the Company. According to Marmolejo, he said that he had filed a complaint against the Company but not against Ortega personally.⁴ Marmolejo stated that Ortega asked if the other employees had made a complaint with Humberto Yepes and he responded that he didn't know.

On Tuesday, March 10, 1992, Jairo Duque was absent from the job and visited the Labor Board where he gave an affidavit. He had received permission to take the day off from Foreman Alzate but did not tell him where he was going. Duque was also absent from work on March 11, 1992.

On Thursday morning, March 12, 1992, Libardo Quintero, Carlos Silva, and the Duque brothers were told not to begin work but to wait for Ortega to arrive.

According to Libardo Quintero, Ortega asked them if it was true that they had filed a complaint against him with the Union. Quintero states that when they denied this, Ortega said that he saw the complaint and the signatures. Quintero asserts that Jairo Duque said that Ortega was misinformed and that Silva said that he had not filed a complaint against Ortega but was going to file one now. Quintero recalled that Ortega told the group to look for jobs at Wall Street, but doesn't recall if Ortega said anything about working at 1411 Broadway.

Jairo Duque testified that when Ortega came in, he told the group of four that they could not work and that he was informed that they had put in a complaint with the Union against him and the Company. Duque states that he denied this and challenged Ortega by asking if he had seen all the names on the complaint. According to Duque, Ortega replied "no" but that he did see the name of Humberto Yepes and that he (Duque), should talk to Yepes. (Although Jairo Duque states that he didn't know what Ortega meant by this, I suspect that Ortega was implying that Duque should convince Yepes to withdraw his complaint.) According to Jairo Duque, when he asked whether that meant that he would have a job if he talked to Yepes, Ortega said "no"; to let him calm down; and that he would call Duque later.

Cesar Duque and Carlos Silva also testified to this transaction on March 12, 1992. In essence, both claim that Ortega initially accused the men of having filed a complaint against him and the Company which was denied by them. Cesar Duque testified that Ortega asked Jairo Duque to speak with Yepes. Carlos Silva testified that Ortega initially told the group that they were laid off but then told them that they should go to 1411 Broadway or 100 Wall Street to get work.

Pablo Ortega testified that shortly before Thursday, March 12, 1992, he was scheduled to go back to work on a new job at 1411 Broadway which was to be done by a crew of six on the weekends. He states that he initially picked a crew to transfer from the Grace building to 1411 Broadway which did not include either the Duque brothers, Libardo Quintero, or Carlos Silva. He states that on the morning of March 12, he heard on the walkie talkie that these four men were downstairs shortly before starting time and that he then changed his mind about the assignments and decided to put them into 1411 Broadway rather than the original group that he had previously selected. According to Ortega, the thing that made

him change his mind about the assignment was the fact that Jairo Duque had missed work on March 10 and 11 without calling in and that the others were late to work.

According to Ortega, this decision was made on the spur of the moment and had nothing to do with the fact that a charge had been filed with the NLRB. Nevertheless, Ortega admits that "by this time I had heard that Humberto had filed against me and I told Jairo Duque to speak to Humberto; to have Humberto call me up because I wanted to speak to him and I was very upset." Ortega further concedes that in this same conversation, he asked the group if they had heard about Yepes' complaint and if they were with Yepes.

Carlos Loaza testified that on March 12, 1992, he spoke with Foreman Javier Alzate who told him and employee Harold Rueda, that a group of employees could no longer work because they had put in a complaint against the Company. He states that later in the day, his brother Gustavo Loaza (also a foreman) told him essentially the same thing. In this regard, Alzate did not really deny the conversation, albeit stating that he was not speaking on behalf of the Company but merely repeating rumors heard from other employees to the effect that Humberto Yepes had filed a complaint and that there were other people who were with him. (Gustavo Loaza no longer worked for the Company at the time of the hearing and his address was not known.)

Jairo Duque testified that on the evening of March 12, he spoke on the telephone with Ortega who asked if he had spoken to Yepes. When he said that he hadn't, Ortega told him to pick up his layoff check on March 13.

According to Jairo Duque, he along with his brother and Carlos Silva went to the lobby of the Grace building on the morning of March 13, to pick up their checks. He states that Ortega again asked if he (Duque), had spoken to Yepes and further asked why Yepes was doing this to him. According to Duque, Ortega said that he knew about the complaint with the National Labor Relations Board. Duque states that Ortega said that they could go to 1411 Broadway or 100 Wall Street to find jobs. Ortega, on the other hand, recalls simply giving out checks to about 40 people on March 13, and doesn't recall having any conversation with Jairo Duque on that date. In this regard, neither Cesar Duque, Carlos Silva, nor Libardo Quintero could recall Ortega saying much of anything on this date.

Yepes testified that on the evening of March 13, he received a phone call from Ortega. He states that Ortega said that he had found out about Yepes' complaint against the Company and that Yepes had put him in great "problems" with the Company. According to Yepes, Ortega said that Yepes was ungrateful and stated just before hanging up, "you're never going to work with me again, not even with the Company." That conversation, according to Yepes was the last time that he ever spoke with Ortega.

Although Ortega admits speaking to Yepes on the phone, he places the conversation on March 12, 1992. (This is not a material difference.) Ortega states that he told Yepes that he was extremely upset with him because he had given Yepes work and then heard that Yepes had filed a complaint against him. According to Ortega, Yepes responded that he was upset because he was not being used as a supervisor; that he felt very humiliated by not being given supervisor's work and not being brought over to the Grace build-

⁴In this regard, Marmolejo states that he was referring to a complaint made to the Union and not to the Labor Board.

ing. Ortega denies that he told Yepes that he would never work again for Ortega or the Company.

Ortega testified that on the evening of Friday, March 13, he telephoned the home of the Duque brothers and left word with their sister that they were supposed to go to work on Saturday morning at 1411 Broadway. It does not appear that this message was transmitted, assuming that it was sent as described by Ortega.

Neither the Duque brothers, Libardo Quintero, nor Carlos Silva went to 1411 Broadway on the weekend of March 14. They testified that they did go to 100 Wall Street on the morning of Monday March 16, but found no one there. Assuming that they were being misled about the possibility of job openings, they did not go to 1411 Broadway.

According to Ortega, he decided not to call these employees for any more jobs because they failed to show up for the weekend assignment on March 14, 1992. (In the case of Quintero, Ortega asserts that he was only a part-time worker anyway and that there was no work available for him to do after March 13.) This was not, however, communicated to these employees. In late March or early April 1992, Ortega, on being asked for work by Silva, relented and put him to work on the 1411 Broadway job for about 4 to 6 weekends.

In the meantime, Rodrigo Marmolejo, despite his assertion that on or about March 10, 1992, he was asked about and told Ortega that he had made a complaint, continued to be employed without interruption at the Grace building jobsite. Marmolejo states that he continued to work at this site until about mid-March when he was told by Foreman Alzate that he and the others who had been in Ortega's group were being transferred to 1411 Broadway. Marmolejo continued to work at 1411 Broadway until that project was completed. He testified that after the 1411 job was completed, he and another employee went to a new project at the Mercedes Benz building but that he was not put to work on that job, although others were.

Pablo Ortega testified that Marmolejo worked for the Company from March through May 1992. He states that when they completed the 1411 Broadway job, he took a reduced crew of about 15 people to Mercedes Benz because that job did not require the services of the 25-member crew that had worked at 1411 Broadway. He states that Marmolejo and Jaime Vargas showed up at the Mercedes Benz job but that he only hired Vargas because Vargas could use a torch but that there was no other work available due to the reduced size of the crew.

Analysis

The General Counsel alleges that the Respondent refused to rehire Humberto Yepes because he filed an unfair labor practice charge against the Company. She also alleges that it laid off or discharged certain other employees because the Company suspected that they assisted Yepes in relation to the unfair labor practice charge which he filed.

There is no contention that the Employer took any adverse action against any of these employees because they filed any complaints with any union or that they concertedly objected to the Company utilizing nonunion employees at the Grace building.

There is also no contention that when Yepes was laid off from the 1411 Broadway jobsite some time in February 1992, that this action was illegal under the National Labor

Relations Act. Nor is it contended that there was anything unlawful in the Company's failure to offer Yepes a job at the Grace building when the other members of the 1411 Broadway crew were offered jobs at that location prior to March 9, 1992. (Recall that March 9, is the date that his unfair labor practice charge was received by the Company.)

It is my impression that the individuals involved in this case were intelligent and hardworking people. It also is my impression that they tended to talk to each other with a degree of indirection that native New Yorkers are not used to. In that sense, it seems to me that they spoke to each other by implication and this at times, resulted either in mutual misunderstanding or in my being unable to determine exactly what someone meant when something was said.

Pursuant to Section 8(a)(4) of the Act, an employer may not discharge or otherwise discriminate against an employee because he or she has filed charges or given testimony under the Act. This provision has been construed to include situations where employees have given affidavits to the NLRB. It also is applicable when an employee is discriminated against because an employer suspects him of filing a charge or giving testimony. *NLRB v. Scrivener*, 415 U.S. 117 (1972); *Trayco of S.C.*, 297 NLRB 630 (1990).

In the case of Humberto Yepes, it is clear that his initial layoff in February 1992 was not caused by any union or protected activity under the National Labor Relations Act. More likely is that he and Pablo Ortega, now in reverse positions, were uncomfortable in their new relationship.

It also seems to me that when Ortega sought to obtain a full crew for the Grace building project in early March 1992, he did not intend to hire Yepes for this job. As Ortega's initial decision not to rehire Yepes at least for this particular project, preceded the Company's receipt of Yepes' charge, it cannot have been motivated by the filing of the charge. This does not mean however, that the Respondent is off the hook. It still could have violated the Act vis-a-vis Yepes if it later decided not to rehire or recall him to any job, in substantial part because he filed a charge against the Company.

In my opinion, the evidence shows that when Ortega was advised on March 9, 1992, that Yepes had filed an unfair labor practice charge against him and the Company, he overreacted. By his own testimony, he was very upset about the charge and thought that Yepes had betrayed him.

I credit the testimony of Yepes to the effect that on or about March 13, 1992, he had a telephone conversation with Ortega in which the latter expressed his displeasure about Yepes' having filed a complaint. I also credit Yepes' testimony that Ortega told him "you're never going of [sic] work with me again."

Although Yepes had not been hired for the Grace building project (for nondiscriminatory reasons), this did not mean that the Company had manifested, prior to March 13, 1992, a decision to never hire him for any other future jobs. This changed, however, by the conversation between Yepes and Ortega on March 13, when Ortega indicated that the Respondent would never rehire Yepes in the future. In this respect, I think that the Respondent made and announced a decision not to rehire Yepes, not only for the Grace job, but for any future jobs. As this, in my opinion, was notification of an unequivocal decision not to rehire Yepes for future jobs, I think that it is actionable if it was motivated by illegal considerations and would not have taken place for some

other legitimate reasons. As I believe that Ortega made up his mind never to rehire Yepes after receiving notice that Yepes had filed an unfair labor practice charge, I conclude that the Respondent violated Section 8(a)(1) and (4) of the Act when Ortega told Yepes on March 13, that he would never rehire Yepes.

I also conclude that Ortega's decision on Thursday, March 12, to remove the Duque brothers, Libardo Quintero, and Carlos Silva from the Grace building project was motivated by his belief that they had supported Yepes in relation to the filing of the unfair labor practice charge. There is really no dispute but that when Ortega told these men that they were off this job, he simultaneously spoke of the complaint that Yepes had filed against him and the Company and asked Jairo Duque to contact Yepes, apparently intending for Duque to convince Yepes to withdraw the charge. It may be that the four employees did not understand that Ortega was talking about an unfair labor practice charge, believing instead that he was talking about a union complaint. Nevertheless, looking at this transaction from the outside, I think that Ortega was referring to the unfair labor practice charge which had just been received on March 9, 1992, and which admittedly upset Ortega. (There was no showing that the Company had received some kind of complaint from any union.)

I do not believe that Ortega made the decision to remove these four men from the Grace building project for the reasons he gave at the hearing. For one thing, the testimony of all the participants to the conversation of March 12, 1992, made no reference to those asserted reasons and the only thing mentioned by Ortega during that conversation or in his subsequent conversation with Jairo Duque, was the Yepes complaint.

Given my conclusion that Ortega's decision was motivated by unlawful reasons, the next question is whether on March 12, the four men were discharged, laid off, or transferred to another job at 1411 Broadway. Here, we face some difficulty because of the ambiguous nature of what these people remember being said. Nevertheless, even assuming that the men were not discharged or laid off but only transferred, this would also be violative of the Act, particularly as the new assignment was a night job which involved only weekend work, with lower weekly earnings.

In my opinion, the credible evidence establishes that Ortega, after telling the four men that they no longer could work at the Grace building, told them that they might be able to get jobs at 1411 Broadway or 100 Wall Street where the Company was working on other projects. I do not believe that he told them that they were definitely reassigned to work at 1411 Broadway and/or that they should report to that location on Saturday morning. Assuming for argument's sake that he attempted to call the Duque brothers on Friday night to have them report to work on the next day at 1411 Broadway, he did not manage to convey that message to them. When the men went to 100 Wall Street on Monday morning, they found no one from the Company at that location and reasoned that Ortega had misled them about the availability of jobs. They therefore did not go to the 1411 Broadway site to look for work.

As stated by the Board in *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979):

The test for determining "whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged." and "the fact of a discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated."⁵

Applying this test to the facts of the present case, it is my conclusion that the employees involved here were in fact discharged because they had a reasonable basis for believing from the events from March 12 to 15, that the Company no longer desired their services. The fact that Carlos Silva was eventually rehired for the 1411 Broadway job, does not change my opinion as this occurred well after the events of March 12 and simply represents, in my opinion, the fact that Ortega changed his mind about Silva. I therefore conclude that by discharging these men on March 12, 1992, because it believed that they supported or assisted Yepes in relation to his filing of an unfair labor practice charge, the Respondent violated Section 8(a)(1) and (4) of the Act.⁶

Having concluded that the Respondent unlawfully discriminated against Yepes, Quintero, Silva, and the Duque brothers, I nevertheless do not believe that the evidence shows that the Employer discriminated against Rodrigo Marmolejo.

Marmolejo testified that he was questioned by Ortega on March 10, 1992, about whether he had filed a complaint, and whether other employees had made a complaint with Humberto Yepes. He states that he told Ortega that he had filed a complaint against the Company but not Ortega and that he knew nothing about any other complaints. (In fact, there is no indication that Marmolejo had filed or made any complaints to anyone.)

In any event, Marmolejo, notwithstanding the above, continued to work at the Grace building, until he, along with the other employees who were members of Ortega's usual crew, were transferred back to 1411 Broadway. He worked at 1411 Broadway until that project was completed. His complaint is based on the fact that when the job at 1411 was finished, Ortega took part of that crew over to another project at the Mercedes Benz building but did not hire him.

The evidence shows that the Mercedes Benz job required a smaller crew than what was required by the preceding job at 1411 Broadway. Thus, Marmolejo was not the only member of that crew that was not hired to work at the new job. In this respect, Ortega testified without contradiction that another man was selected to work over Marmolejo because this person (Jaime Vargas), knew how to use a torch and Marmolejo did not.

In my opinion, the fact that Marmolejo may have told Ortega back on March 10, 1992, that he had made some sort of complaint against the Company, does not show that the Company's failure to use him on a new job in June 1992, was motivated by discriminatory reasons. I am satisfied with

⁵ See also *Dublin Town Ltd.*, 282 NLRB 307, 308 (1986).

⁶ Having determined that the Respondent unlawfully discharged Libardo Quintero on March 12, 1992, the allegation in the complaint that the Respondent refused to allow him to return to work on or about April 9, 1992, is redundant and unnecessary.

Ortega's explanation in this instance, and I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. By notifying Humberto Yeppes on March 13, 1992, that the Company would never rehire him and by doing so because he filed an unfair labor practice charge, the Respondent violated Section 8(a)(1) and (4) of the Act.

2. By discharging Libardo Quintero, Carlos Silva, Jairo Duque, and Cesar Duque on March 12, 1992, because the Respondent believed or suspected that they assisted Yeppes in the filing of his charge, the Respondent violated Section 8(a)(1) and (4) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act in any other manner alleged in the consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged or refused to hire employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁷

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

⁷ In the case of Humberto Yeppes he was not hired for the Grace building job for nondiscriminatory reasons. Also, as of March 13, 1992, when I concluded that the Respondent notified him that he would never be rehired, it is not clear whether there was any position available to him. Therefore, it would not be appropriate to automatically commence backpay as of March 13, 1992, and inquiry should be made as to whether any new persons were hired after that date by the Company at its New York City jobsites to determine if and when Yeppes could reasonably have been expected to be hired but for the illegal discrimination against him. Insofar as reinstatement is concerned, I shall recommend that the Respondent offer him employment in a nonsupervisory capacity as this was his position at the time he was initially laid off.

At the hearing, the Respondent wished to question the discriminatees about whether they were legally in the United States or had valid green cards. I sustained an objection to these questions and ruled that this issue should be raised, if necessary, at the compliance stage. See *Accent Maintenance Corp.*, 303 NLRB 294, 297 fn. 7 (1991).

Reinstatement offers to all these men can only be made to the extent that the Respondent has, at the time the Order in this case is complied with, an appropriate project in the New York City area where it has been engaged and is employing workers.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The Respondent, National Surface Cleaning, Inc., Elmwood Park, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, refusing to hire, or otherwise discriminating against any employee for filing an unfair labor practice charge or giving testimony in support of such a charge.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Humberto Yeppes, Jairo Duque, Cesar Duque, Libardo Quintero, and Carlos Silva immediate and full reinstatement to their former nonsupervisory jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and refusals to hire and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Elmwood Park, New Jersey, and at all jobsites located in New York City, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

omended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, refuse to hire, or otherwise discriminate against any of you for filing an unfair labor practice charge or giving testimony to the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Humberto Yeppes, Jairo Duque, Cesar Duque, Libardo Quintero, and Carlos Silva immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge or refusal to hire and that such actions will not be used against him in any way.

NATIONAL SURFACE CLEANING, INC.